# Rohaya bt Ali Haidar v AmBank (M) Bhd (previously known as 'MBf Finance Bhd')

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-02(MUA)(A)-1568–09 OF 2014
ABDUL AZIZ ABDUL RAHIM, ROHANA YUSUF AND PRASAD ABRAHAM JJCA
7 MARCH 2016

*Civil Procedure — Functus officio — Application to set aside — Application to set aside order for sale after issuance of certificate of sale — Whether judge functus officio after order for sale granted — When court permitted to depart from functus officio concept and set aside order for sale*

*Land Law — Indefeasibility of title and interests — Property acquired at public auction pursuant to certificate of sale issued by court — Auction mistakenly conducted — Whether order for sale may be set aside due to mistake of fact — Whether purchaser at auction acquired indefeasible title — Whether National Land Code s 340(2) applicable*

*Land Law — Sale of land — Order for — Setting aside — Application to set aside order for sale after issuance of certificate of sale — Whether judge functus officio after order for sale granted — When court permitted to depart from functus officio concept and set aside order for sale*

MBf Finance Bhd which is now known as AmBank (M) Bhd had in 1997 granted a mortgage loan to Twinsprings Development Sdn Bhd ('the borrower'). As a security for the repayment, the registered proprietor of the land, one Syarikat Sri Semujong Sdn Bhd ('the chargor') had created a third party charge over the land in favour of the MBf Finance Bhd. The borrower defaulted on the loan and the respondent instituted a charge action against the chargor. The High Court allowed the charge action and ordered for the land to be sold by way of public auction. On 25 November 2008, the land was successfully auctioned off to the appellant for a sum of RM615,000. Post-auction, the respondent received a letter from solicitors acting for one Supinah bt Asrif, the sixth defendant in the court below, requesting clarification of the sale of the land through the public auction. Only then the respondent discovered a loan agreement dated 22 August 1996 executed between the sixth defendant and the respondent and a letter of disclaimer and undertaking dated 2 September 1997 issued by the respondent to the effect of 'disclaiming' interest in the lot purchased by the sixth defendant and excluding

that lot from the respondent's charge. Thereafter, the respondent conducted further internal enquiries and discovered a separate letter of disclaimer and undertaking dated 29 July 1997, which listed eight other third party purchasers/borrowers who were in the same position as the sixth defendant. The respondent thus applied to the High Court for an order that the order for sale and the auction sale of the land to be declared null, void and to be set aside. The respondent also sought to return to the appellant (the successful bidder) the deposit and the payments received by the respondent in connection with the sale of the land through the public auction. The High Court granted the orders sought by the respondent hence this appeal by the appellant.

**Held,** allowing the appeal with costs:

(1) In a situation where an order for sale was granted by the High Court in favour of the apellant and a certificate of sale issued in favour of the appellant in accordance with the provision of National Land Code ('the NLC'), the court was 'functus officio' in respect of all proceedings under the order for sale and the court had no power to set aside the said order for sale by way of a separate application or otherwise (see para 13).

(2) The earlier purchaser of the said land based on the letters of disclaimers issued by the respondent had their interest (if any) subject to the respective charges on the said lands. What the respondent should have done was to take immediate steps to redeem the land in question or part of it but had failed to do so. Therefore it followed that the interest of the purchasers would be subject to the registered charge and to the appellant who acquired the registered and indefeasible interest in the said land when they had paid the said purchase price after the public auction and the certificate of sale was issued to them by the court (see para 17).

(3) The learned judge in her grounds of judgment failed to address the question of 'functus officio' and the fact that this disentitled her to grant an order setting aside the said order for sale. This by itself was a sufficient ground to allow the appeal (see para 18).

(4) The learned judge also erred in her grounds of judgment where it was said that the indefeasible position of the appellant after having been registered as a registered proprietor vide certificate of sale could be set aside or rendered defeasible by virtue of mistake of fact on the part of the respondent. Clearly the respondent would not be able to avail itself of s 340(2) of the NLC based on the facts of this case (see para 19).

(5) The respondent having made a mistake in not addressing the interest of this earlier purchasers and the letters of disclaimers that the respondent had issued, could not now come to court to set aside the order for sale so as to protect their own shortcomings. These purchasers rights (if any) were against the respondent (if at all) based on the letters of disclaimers

A that the respondent has issued. That certainly could not constitute a basis to defeat the registered interest of the appellant under s 340(1) of the NLC (see para 20).

**[Bahasa Malaysia summary**

B MBf Finance Bhd yang kini dikenali sebagai AmBank (M) Bhd telah pada 1997 memberikan pinjaman gadai janji kepada Twinsprings Development Sdn Bhd ('peminjam'). Sebagai jaminan untuk pembayaran balik, pemilik berdaftar tanah itu, pemilik tanah berdaftar itu, Syarikat Sri Semujong Sdn Bhd ('penggadai') telah mewujudkan gadaian ke atas tanah itu menyebelahi MBf
C Finance Bhd. Peminjam telah gagal atas pinjaman itu dan responden telah memulakan tindakan gadaian terhadap penggadai. Mahkamah Tinggi membenarkan tindakan gadaian dan memerintahkan agar tanah tersebut dijual melalui lelongan awam. Pada 25 November 2008, tanah tersebut telah berjaya dilelong kepada perayu untuk jumlah RM615,000. Selepas lelongan
D itu, responden telah menerima surat daripada peguamcara yang bertindak bagi pihak Supinah bt Asrif, defendan keenam di mahkamah bawahan, telah meminta penjelasan tentang jualan tanah tersebut melalui lelongan awam. Hanya selepas itu responden mendapati perjanjian pinjaman bertarikh 22 Ogos 1996 disempurnakan antara defendan keenam dan responden dan
E surat penafian dan aku janji bertarikh 2 September 1997 telah dikeluarkan oleh responden yng memberi kesan kepada faedah 'disclaiming' dalam lot yang dibeli oleh defendan keenam dan mengecualikan lot tersebut daripada gadaian responden. Selepas itu, responden telah menjalankan beberapa siasatan dalaman dan mendapati surat penafian dan aku janji yang berasingan bertarikh
F 29 Julai 1997, yang menyenaraikan lapan lagi pembeli/peminjam pihak ketiga yang berada dalam kedudukan sama seperti defendan keenam. Responden oleh itu telah memohon kepada Mahkamah Tinggi untuk perintah agar perintah jualan dan jualan lelongan tanah tersebut diisytiharkan terbatal, tidak sah dan diketepikan. Responden juga memohon untuk memulangkan kepada perayu
G (pembida yang berjaya) deposit dan bayaran yang diterima oleh responden berkaitan jualan tanah itu melalui lelongan awam. Mahkamah Tinggi memberikan perintah yang dipohon oleh responden justeru rayuan ini oleh perayu.

H **Diputuskan,** membenarkan rayuan dengan kos:

(1) Dalam keadaan di mana perintah untuk jualan telah diberikan oleh Mahkamah Tinggi yang menyebelahi perayu dan perakuan jualan dikeluarkan menyebelahi perayu menurut peruntukan Kanun Tanah
I Negara ('KTN'), mahkamah adalah 'functus officio' berhubung semua prosiding di bawah perintah jualan dan mahkamah tiada kuasa untuk mengetepikan perintah jualan itu melalui permohonan berasingan atau sebaliknya (lihat perenggan 13).

(2) Pembeli terdahulu tanah tersebut berdasarkan surat-surat penafian yang

dikeluarkan oleh responden mempunyai kepentingan (jika ada) tertakluk kepada gadaian masing-masing ke atas tanah-tanah tersebut. Apa yang responden patut lakukan adalah langkah-langkah segera untuk menebus tanah yang dipersoalkan atau sebahagiannya tetapi gagal berbuat demikian. Oleh itu, ia diikuti bahawa kepentingan pembeli-pembeli adalah tertakluk kepada gadaian berdaftar dan kepada perayu yang telah memperoleh kepentingan berdaftar dan tidak disangkal dalam tanah tersebut apabila mereka telah membayar harga belian tersebut selepas lelongan awam dan perakuan jualan yang dikeluarkan kepada mereka oleh mahkamah (lihat perenggan 17).

(3) Hakim bijasana dalam alasan penghakiman beliau gagal untuk mengemukakan persoalan 'functus officio' dan fakta babhawa ini melucutkan haknya untuk memberikan perintah yang mengetepikan perintah jualan tersebut. Ini dengan sendirinya adalah alasan mencukupi untuk membenarkan rayuan (lihat perenggan 18).

(4) Hakim bijaksana juga terkhilaf dalam alasan penghakiman beliau di mana ia dikatakan bahawa kedudukan yang tidak boleh disangkal perayu itu selepas didaftar sebagai pemilik berdaftar melalui perakuan jualan boleh diketepikan atau dijadikan yang boleh disangkal menurut kesilapan fakta di pihak responden. Adalah jelas responden tidak boleh menggunakannya s 340(2) KTN dengan sendiri berdasarkan fakta kes ini (lihat perenggan 19).

(5) Responden setelah membuat kesilapan kerana tidak mengemukakan kepentingan pembeli-pembeli terdahulu dan surat-surat penafian yang telah dikeluarkan oleh responden, sekarang tidak boleh hadir ke mahkamah untuk mengetepikan perintah jualan bagi melindungi kelemahan mereka sendiri. Hak pembeli tersebut (jika ada) adalah terhadap responden (jika sesiapa pun) berdasarkan surat-surat penafian yang telah dikeluarkan oleh responden. Itu semestinya tidak boleh membentuk asas untuk menggagalkan kepentingan berdaftar perayu di bawah s 340(1) KTN (lihat perenggan 20).]

**Notes**

For cases on application to set aside, see 2(2) *Mallal's Digest* (5th Ed, 2015) paras 3605–3615.

For cases on indefeasibility of title and interests in general, see 8(2) *Mallal's Digest* (5th Ed, 2015) paras 3630–3796.

For cases on order for sale of land, see 8(3) *Mallal's Digest* (5th Ed, 2015) paras 5104–5223.

**Cases referred to**

*Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd* [1992] 2 MLJ 650, SC (refd)

*MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, intervener)* [1992] 2 MLJ 642; [1992] 1 CLJ Rep 222, SC (refd)
*Scotch Leasing Sdn Bhd (in receivership) v Chee Pok Choy & Ors* [1997] 2 MLJ 105, SC (refd)

**Legislation referred to**

National Land Code s 340, 340(1), (2)

**Appeal from:** Originating Summons No 24M-1170–07 of 2011 (High Court, Seremban)

*Frances Peter (Amira Farhana bt Mohd Yasin with him) (Frances, Hazlina & Partners) for the appellant.*
*Andrew Teh (Foong Mun Yee and Tan Chong Pei with him) (Wong Lu Peen & Tunku Alina) for the respondent.*

**Prasad Abraham JCA:**

**[1]** We heard and disposed of this appeal on 4 August 2015 wherein we allowed the appeal and the High Court's decision was set aside. We shall refer to the parties as appellant and respondent.

MATERIAL FACTS

**[2]** The respondent was a licensed financial institution and at all material time was the registered chargee of the land held under Issue Document Title No CT 7979, CT 7980, CT 7981, Lot 1086, 1087 and 1088, Mukim Pantai, Negeri Sembilan ('land'). In 2006, the respondent exercised its rights under the charge and applied for an order for sale of the land by way of public auction ('the said order for sale'). The respondent obtained an order for sale from the Seremban High Court. The land was subsequently auctioned off and sold on 25 November 2008.

**[3]** The appellant was the successful bidder of the land at the public auction carried out pursuant to the order for sale.

**[4]** Through MBf Finance Bhd's letter dated 17 January 1997, the respondent granted a mortgage loan of RM1,120,000 to Twinsprings Development Sdn Bhd ('borrower'). As a security for the repayment, the registered proprietor of the land, one Syarikat Sri Semujong Sendirian Bhd ('chargor') created a third party charge over the land in favour of the MBf Finance Bhd on 17 March 1997.

**[5]** On 3 April 2002, MBf Finance Bhd changed its name to AmFinance Bhd and it was subsequently changed to its current name AmBank (M) Bhd on 1 June 2005.

**[6]** The borrower Twinsprings Development Sdn Bhd failed to comply with the repayment terms of the loan. By reasons of the said default, the respondent instituted a charge action through Seremban High Court Originating Summons No 24–770 of 2006 against the registered proprietor Syarikat Sri Semujong Sdn Bhd.

**[7]** On 26 June 2007, the Seremban High Court allowed the charge action and ordered for the land to be sold by way of public auction. On 25 November 2008, the land was successfully auctioned off to the appellant for a sum of RM615,000.

**[8]** Post-auction, the respondent had on 11 October 2010 received a letter from solicitors acting for one Supinah bt Asrif, the sixth defendant in the court below, requesting clarification of the sale of the land through the public auction.

**[9]** After receiving the letter, the respondent discovered a loan agreement dated 22 August 1996 executed between the sixth defendant and the respondent and a letter of disclaimer and undertaking dated 2 September 1997 issued by the respondent to the effect of 'disclaiming' interest in the lot purchased by the sixth defendant and excluding that lot from the respondent's charge.

**[10]** Thereafter, the respondent conducted further internal enquiries and discovered a separate letter of disclaimer and undertaking dated 29 July 1997, which listed eight other third party purchasers/borrowers who were in the same position as the sixth defendant. The common trait among these third party purchasers/borrowers is that they had purchased their respective individual lots in the land directly from the developer and they had obtained end-financing from the respondent to finance their purchases.

**[11]** On 15 July 2011, the respondent filed an action through Seremban High Court Originating Summons No 24–1170–07 of 2011 ('application'). Through the application, the respondent applied for the order for sale dated 26 June 2007 and the auction sale of the land on 25 November 2008 to be declared null, void and to be set aside. The respondent had also sought to return to the appellant (the successful bidder) the deposit and the payments received by the respondent in connection with the sale of the land through the public auction.

**[12]** The High Court granted the orders sought by the respondent hence this appeal.

FINDINGS OF THE COURT

**[13]** It is our view that in a situation where an order for sale was granted by the High Court in favour of the appellant and a certificate of sale issued in favour of the appellant in accordance with the provision of National Land Code ('the NLC'), the court is 'functus officio' in respect of all proceedings under the order for sale and the court has no power to set aside the said order for sale by way of a separate application or otherwise.

**[14]** We refer to the decision of the Supreme Court in *MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, intervener)* [1992] 2 MLJ 642; [1992] 1 CLJ Rep 222 where it was held:

> [1] The application for an order for sale by the chargee appellant/bank was properly made under s 256(1) and (2) and the court correctly granted the order on 29 August 1988 under ss 256(3) and 257 of the National Land Code. The procedure prior to the sale under s 258 of the National Land Code was also complied with.
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> [2] The learned judge was clearly functus officio after he made the order for sale on 29 August 1990. In this case, the order for sale was made, drawn up and perfected and the learned judge was functus officio and therefore had no power to set aside the order for sale which was a final order.

We refer to the judgment of Harun Hashim SCJ found at p 648 (MLJ); pp 228–229 (CLJ) and we quote:

> Under the National Land Code, there is nothing to prevent a chargor with the consent of the chargee to sell the charged property by private treaty. There are no specific provisions in the Code for such a sale but if such a sale is concluded as a purely business arrangement, it is for the chargee to discharge the charge to give full effect to the sale. That was not done here, although the bank must have been aware that it had instructed solicitors to apply to the court for an order for sale of the land by public auction and yet subsequently had given approval for the land to be sold by private treaty to Beh. The sale by private treaty here however did not confer any superior interest in the land in Beh against the indefeasible interest of the bank conferred by s 340(1) unless such interest is made defeasible on account of fraud, forgery or illegality on the part of the bank under s 340(2). If Beh wishes to press on with his claims, then he should do so in a separate action: see *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143; [1980] 1 LNS 92.
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> The application to intervene in the present proceedings was not made until a week after the issue of the certificate of sale by which time the auction sale was completed. The learned Judge was clearly functus officio by then. Indeed, following *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143; [1980] 1 LNS 92 the learned judge was functus officio after he made the order for sale on 29 August 1988. In the *Hock Hua* case, the allegations of fraud and forgery were made after the judge had made the order for sale but before the auction sale and the Federal Court held that

the judge was functus officio after he made the order for sale in foreclosure proceedings when the order had been drawn up and perfected. *True, after making an order for sale, the judge has the power to make other orders including changes in the reserve price and the auction sale dates but such orders are consequential to the order for sale. The point here is that the order for sale is a final order unless appealed against. Once the order for sale is made, drawn up and perfected, as here, the learned judge is functus officio and therefore has no power to set aside the order for sale.* (Emphasis added.)

**[15]** It is to be observed in this case, the facts were fairly similar to ours in that there was a buyer who had attempted to purchase the land from the owner and therefore attempted to intervene to set aside the public auction of the land. The Supreme Court however maintained the position in law as we had set out earlier.

**[16]** This position in law was further emphasised in the Supreme Court's decision in *Scotch Leasing Sdn Bhd (in receivership) v Chee Pok Choy & Ors* [1997] 2 MLJ 105 where it was held:

An order of sale of charged land was a final order unless appealed against and once it was made, drawn up and perfected, the judge was functus officio and therefore had no power to set aside the order of sale. Thus, the judge in the court below had no power to hear the application to set aside and make the second order (see p 108H-I); *MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, intervener)* [1992] 2 MLJ 642 followed and *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374 distinguished.

To allow the judge in the court below to reopen the matter nine months after it was decided by himself would bring absolute chaos to the judicial system. A jurisdiction point is no less an issue than other issues in civil litigation. If not raised at the hearing in the court of first instance or on appeal, it could not be raised thereafter, for the doctrine of res judicata sets in (see p 11OD-F); *MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, intervener)* [1992] 2 MLJ 642 and *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 followed and *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd &Anor* [1996] 1 MLJ 374 distinguished.

We refer to the judgment of Peh Swee Chin CJ at pp 109–110 and we quote:

On the point that the High Court had no jurisdiction to make an order of sale in the case of land held under a land office title, the point seems to be wellfounded, see *United Asian Bank Bhd v Elgi Marka Sdn Bhd* [1995] 1 MLJ 301; [1995] 1 AMR 244 and *Tan Teng Pan v Wong Fook Shang* [1973] 1 MLJ 31; [1972] 1 LNS 150.

This point of jurisdiction can be raised on appeal, of course, and it goes without saying a fortiori it can be raised in a court of first instance. This point was raised before us, and it was in fact also raised before the learned judge in the court below. However, in the circumstances of this case as set out below, one cannot yet say *cadit quaestio*.

In so far as it was raised before the learned judge, it was not raised before the order of sale was made on 3 September 1991. That order of sale, in fact has never been appealed against.

It was raised in a subsequent summons in the same case as an afterthought, filed on 8 June 1992, thus offending the general rule stated in the *MUI Bank* case, *and also not coming within the exception to such general rule as in Muniandy*.

We do not think it could be so raised and acted on by the judge. It could have, of course been raised on appeal if an appeal was filed against the order of sale made on 3 September 1991. If before such an appeal was filed and before the said order of sale was perfected, it could be also reviewed by the court in exercise of its inherent jurisdiction; see *Re Harrison's Settlement* [1955] 1 All ER 185; and *Syarikat Marak Jaya*.

To allow the learned judge in the court below to re-open the matter nine months after it was decided by himself, (and for that matter any other judge), a court would have to allow, equally, another judge exercising an co-ordinate jurisdiction to set it aside on the same jurisdiction point after, say, twenty years, in the same case, for food for a goose is also food for geese. This would bring absolute chaos to our judicial system which does not carry on in such fanciful way as contended by learned counsel for the chargors.

Such chaotic condition is prevented by several things.

First, a jurisdiction point is no less an issue than other issues in civil litigation. If not raised at the hearing in the court of first instance or on appeal, it cannot be raised thereafter, for the doctrine of res judicata sets in.

**[17]** The next decision we would refer to would be the Supreme Court's decision in *Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd* [1992] 2 MLJ 650 where it was held:

(1) SFL, as chargee, held an indefeasible interest in the land (by virtue of s 340(1) of the Code) upon registration of the charge in its favour. Under s 256(3) of the Code, on an application to the court for an order for sale by the chargee, it is mandatory on the court to order the sale unless it is satisfied of the existence of cause to the contrary. No such cause to the contrary arose in this case when the order for sale was made. A successful purchaser at the public auction pursuant to an order for sale under s 256(3) was entitled to a certificate of sale under s 259(3) of the Code. Such a certificate was issued to the appellant. Accordingly, all the requirements of the law have been complied with for the appellant to be registered as the new owner of the land.

(2) The purported revival of the agreement in January 1986; the entry of the caveat in March 1986; the filing of the Suit in September 1986 and allowing the judgment in default in February 1987, smacks of collusion between Tg Petri and the respondent to protect the personal interests of the directors of Tg Petri, past and present.

...

(4) At all material times the option to purchase and the agreement were subject to the registered charge. Shaikh was a director of Tg Petri and in turn a director of the respondent and was well aware of the existence of the charge on the land. Any

> dealing subsequent to the charge and with notice of the charge, as here, cannot defeat the indefeasible interest of the registered chargee and through him the purchaser at a judicial sale.

We refer to the judgment of Harun Hashim SCJ at pp 658–659 and we quote:

> At all material times, the option to purchase and the sale and purchase agreement were subject to the registered charge. Shaikh Mohamad was a director of Tg Petri and in turn a director of the respondent and was well aware of the existence of the charge on the subject land. In any event, the fact of registration of the charge is notice to all the world of its existence.
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> *Any dealing subsequent to the charge and with notice of the charge, as here, cannot defeat the indefeasible interest of the registered chargee and through him the purchaser at a judicial sale. The error in this case was to ignore the indefeasible title of the chargee and the continuous legal operation of the charge from the moment of its registration up to the completion of the judicial sale and the issue of the certificate of sale*. (Emphasis added.)

In our present case the earlier purchaser of the said land based on the letters of disclaimers issued by the respondent had their interest (if any) subject to the respective charges on the said lands. What the respondent should have done was to take immediate steps to redeem the land in question or part of it but had failed to do so. Therefore it follows that the interest of the purchasers would be subject to the registered charge and to the appellant who acquired the registered and indefeasible interest in the said land when they had paid the said purchase price after the public auction and the certificate of sale was issued to them by the court.

**[18]** The learned judge in her grounds of judgment failed to address the question of 'functus officio' and the fact that this disentitled her to grant an order setting aside the said order for sale. In our view this by itself would be a sufficient ground to allow the appeal.

**[19]** The learned judge also erred in her grounds of judgment where it is said that the indefeasible position of the appellant after having been registered as a registered proprietor vide certificate of sale can be set aside or rendered defeasible by virtue of mistake of fact on the part of the respondent. Having looked at s 340 of the NLC which was relied on by the learned judge we are of the view that clearly the respondent would not be able to avail itself of s 340(2) of the said section based on the facts of this case.

**[20]** We find that the respondent having made a mistake in not addressing the interest of this earlier purchasers and the letters of disclaimers that the respondent has issued cannot now come to court to set aside the order for sale so as to protect their own shortcomings. These purchasers rights (if any) are against the respondent (if at all) based on the letters of disclaimers that the respondent has issued. That certainly cannot constitute a basis to defeat the

registered interest of the appellant under s 340(1) of the NLC.

**[21]** For all the aforesaid reasons we allowed this appeal with costs.

*Appeal allowed with costs.*

Reported by Kanesh Sundrum